A **ZUNG ZANG WOOD PRODUCTS SDN BHD & ORS**

v.

KWAN CHEE HANG SDN BHD & ORS

B FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
C JEFFREY TAN FCJ
[CIVIL APPEALS NO: 02-50-07-2012(S) & 02-51-07-2012(S)]
7 OCTOBER 2013

LIMITATION: *Fraudulent disposal and surreptitious conversion of*
D *shares - Whether applicable limitation periods were Items 37 and 77 of Schedule to Sabah Limitation Ordinance and not s. 18 - Whether reasonable for wronged party to have taken 14 months to discover surreptitious conversion of company's shares - Whether conversion apparent from cursory reading of company's accounts - Whether delay in*
E *discovery of fraud and conversion compounded by fact perpetrator entrusted with management of company and subsidiaries for several years*

The first respondent, Kwan Chee Hang Sdn Bhd ('KCH') owned the entire equity of the first appellant ('ZZ Wood') which, in turn,
F held 80% of the equity in the second appellant ('ZZ Holdings'). ZZ Holdings held 80% of the equity in the third appellant ('ZZ Plantation') and 85% of the equity in the sixth appellant ('Granright'). The balance of the equity in ZZ Holdings, ZZ Plantation and Granright were held by the fourth and/or the fifth
G appellants. The second and third respondents, who were husband and wife, were the founders of KCH and parents of the fourth appellant ('Kwan') whose wife was the fifth appellant ('Elaine Gay'). ZZ Plantations and Granright owned substantial tracts of oil palm plantation in Sabah. In two suits (Suits 24 and 26) filed
H in the High Court, the second and third respondents claimed, *inter alia,* that Kwan and Elaine Gay had, by concealed fraudulent allotment and transfer of shares, caused KCH to lose all its direct and indirect interests in the equity of ZZ Wood and ZZ Holdings thus causing it to lose control of ZZ Plantation and Granright and
I the plantation lands. By their dealings, Kwan and Elaine Gay acquired absolute control of all the subsidiary companies of KCH. In another suit ('Suit 39'), KCH claimed that Kwan wrongfully

converted its 1.6m shares in the capital of one Tekala Corporation Bhd ('the Tekala shares') by pledging those shares to a third party as security for a share margin trading account facility granted to him or his order. In their defence, the appellants pleaded that all the three suits, which were tried together, were time-barred under Items 37, 38, 73, 77 and/or 78 and 97 of the Sabah Limitation Ordinance ('SLO'). The trial court held, and the Court of Appeal agreed, that limitation did not apply as time accrued in early 2006 when the respondents first learnt that the plantations were no longer in the hands of KCH and that the Tekala shares had been pledged by Kwan. The trial court granted the reliefs sought by the respondents. The Court of Appeal affirmed those orders. The appellants obtained leave to appeal to the Federal Court.

Held (dismissing appeals, setting aside all orders of courts below)

Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) The limitation periods applicable in the instant appeal were Items 37 and 77 in the Schedule and not s. 18 of the SLO. (paras 38 & 39)

(2) With regard to Suit 39 which was grounded on conversion of specific movable property, *ie*, the Tekala shares, Item 37 applied and time should run from 2006 *ie*, when the respondents first learnt that Kwan had 'surreptitiously' converted the Tekala shares. Although it was argued by the appellants that time accrued upon the release of the accounts in March 2005, the mere signature by the second respondent on the accounts was no evidence that he knew. The second respondent had entrusted the whole management of KCH and its subsidiary companies to Kwan for years and the relationship between the two of them must have been such that confidence was necessarily reposed by the second respondent in Kwan. In any case, it was unreasonable not to give time to the respondents to unravel the accounts. The respondents took 14 months to find out about the pledge of the Tekala shares. Taking all factors into account, 14 months was not an unreasonable time for the respondents to discover the pledge of the Tekala shares by Kwan. (paras 41 & 47)

(3) As the reliefs sought in Suits 24 and 26 were grounded on the sole basis of the fraudulent disposal of the shares of KCH in the capital of ZZ Wood and ZZ Holdings, they fell squarely

under Item 77 where the limitation period was three years from when the fraud became known to the party wronged. The respondents made out, at least *prima facie*, that they first learnt of the alleged fraudulent transfer of shares in early 2006. The appellants did not plead any anterior date of knowledge on the respondents' part. The probabilities were such that first knowledge by the respondents that the plantations had been lost could not have been gained in 2005 as was alleged by the appellants. There was no appealable error to reverse the findings of the courts below that Suits 24 and 26 were filed within time. (para 61)

(4) The court ordered (i) Kwan to pay to KCH the full sum for the redemption of the Tekala shares; (ii) the shareholdings of the members of ZZ Wood and ZZ Holdings be restored to the position before the impugned transfers of the shares; (iii) all the impugned transfers and/or allotments of shares in the capital of ZZ Wood and ZZ Holdings be cancelled and rendered ineffectual; (iv) ZZ Holdings' 80% shareholding in ZZ Plantation and 85% shareholding in Granright be restored; and (v) the register of members of ZZ Wood, ZZ Holdings, ZZ Plantations and Granright be rectified pursuant to s. 162 of the Companies Act 1965 to reflect the changes ordered and that notice of the rectification be lodged. (para 70)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama, Kwan Chee Hang Sdn Bhd ('KCH') memiliki keseluruhan ekuiti perayu pertama ('ZZ Wood') yang mana, memegang 80% ekuiti dalam perayu kedua ('ZZ Holdings'). ZZ Holdings memegang 80% daripada ekuiti dalam perayu ketiga ('ZZ Plantation') dan 85% ekuiti dalam perayu keenam ('Granright'). Baki ekuiti dalam ZZ Holdings, ZZ Plantation dan Granright dipegang oleh perayu keempat dan/atau kelima. Responden kedua dan ketiga, yang merupakan pasangan suami isteri, merupakan pengasas KCH dan ibu bapa kepada perayu keempat ('Kwan') yang mana isterinya adalah perayu kelima ('Elaine Gay'). ZZ Plantations dan Granright memiliki sebahagian besar kawasan ladang kelapa sawit di Sabah. Dalam dua guaman (guaman 24 dan 26) yang difailkan dalam Mahkamah Tinggi, responden kedua dan ketiga mendakwa, antara lain, bahawa Kwan dan Elaine Gay telah, melalui pembahagian dan pemindahan palsu saham-saham yang tersembunyi, menyebabkan KCH kehilangan kesemua kepentingan langsung dan tidak langsung dalam ekuiti ZZ

Wood dan ZZ Holdings justeru menyebabkannya hilang kawalan akan ZZ Plantation dan Granright dan tanah-tanah ladang. Melalui urusan mereka, Kwan dan Elaine Gay memperolehi kawalan penuh ke atas anak-anak syarikat KCH. Dalam satu lagi guaman ('guaman 39'), KCH mendakwa bahawa Kwan telah secara salah mengubahsuai 1.6 juta sahamnya dalam modal Tekala Corporation Bhd ('Saham Tekala') dengan mencagarkan saham-saham tersebut kepada pihak ketiga sebagai cagaran bagi fasiliti akaun dagangan margin saham yang diberikan kepadanya atau perintahnya. Dalam pembelaan mereka, perayu-perayu memplidkan bahawa ketiga-tiga guaman tersebut, yang dibicarakan bersama, dihadkan oleh masa di bawah Item 37, 38, 73, 77 dan/atau 78 dan 97 Ordinan Had Masa Sabah ('OHS'). Mahkamah bicara memutuskan dan Mahkamah Rayuan bersetuju, bahawa had masa tidak terpakai kerana masa terakru pada awal 2006 apabila responden-responden mendapat tahu bahawa ladang-ladang tersebut tidak lagi menjadi milik KCH dan bahawa saham-saham Tekala telah dicagarkan oleh Kwan. Mahkamah bicara membenarkan relief-relief yang dipohon oleh responden-responden. Mahkamah Rayuan mengesahkan perintah-perintah tersebut. Perayu-perayu memperolehi kebenaran untuk merayu ke Mahkamah Persekutuan.

Diputuskan (menolak rayuan-rayuan, mengetepikan kesemua perintah-perintah mahkamah bawahan)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Tempoh had masa yang terguna pakai dalam rayuan ini adalah Item 37 dan 77 dalam Jadual dan bukan s. 18 OHS.

(2) Berkenaan guaman 39 yang mana berkisarkan pada tukar syarat harta alih spesifik, iaitu saham-saham Tekala, Item 37 terpakai dan masa seharusnya bermula dari 2006 iaitu apabila responden mendapat tahu bahawa Kwan telah 'secara sembunyi' mengubah suai saham-saham Tekala. Walaupun dihujahkan oleh perayu-perayu bahawa masa terakru dengan pelepasan akaun pada Mac 2005, tandatangan oleh responden kedua semata-mata pada akaun bukanlah keterangan yang diketahuinya. Responden kedua telah mengamanahkan keseluruhan pengurusan KCH dan anak-anak syarikatnya kepada Kwan selama bertahun-tahun dan hubungan antara kedua-dua mereka adalah sedemikian yang mana kepercayaan semestinya diberikan oleh responden kedua kepada Kwan. Dalam apa jua keadaan, adalah tidak munasabah untuk

memberi masa kepada responden-responden untuk menyelongkar akaun-akaun tersebut. Responden-responden mengambil masa 14 bulan untuk mendapat tahu mengenai cagaran bagi saham-saham Tekala. Mengambil kira semua faktor, 14 bulan bukanlah masa yang munasabah untuk responden-responden mengetahui mengenai cagaran saham-saham Tekala oleh Kwan.

(3) Oleh kerana relief-relief yang dipohon dalam guaman 24 dan 26 adalah berdasarkan alasan utama pelupusan palsu saham-saham KCH dalam modal ZZ Wood dan ZZ Holdings, kedua-duanya terjumlah di bawah Item 77 yang mana tempoh had masa adalah tiga tahun dari bila penipuan diketahui oleh pihak yang terkilan. Responden-responden berjaya membuktikan, pada takat *prima facie*, bahawa mereka mendapat tahu mengenai pemindahan palsu saham-saham pada awal 2006. Perayu-perayu tidak memplidkan sebarang tarikh yang lebih awal mengenai pengetahuan responden-responden. Kemungkinan adalah bahawa pengetahuan awal oleh responden-responden bahawa mereka kehilangan ladang-ladang tidak boleh didapati pada tahun 2005 seperti yang didakwa oleh perayu-perayu. Tiada kekhilafan yang boleh dirayu untuk mengakas dapatan mahkamah-mahkamah bawahan bahawa guaman 24 dan 26 difailkan dalam masa.

(4) Mahkamah mengarahkan (i) Kwan untuk membayar KCH jumlah penuh bagi penebusan saham-saham Tekala; (ii) pegangan saham ahli-ahli ZZ Wood dan ZZ Holdings dipulihkan semula kepada kedudukannya sebelum pindahan saham-saham yang dipertikaikan; (iii) kesemua pindahan-pindahan yang dipertikaikan dan/atau pembahagian saham-saham dalam modal ZZ Wood and ZZ Holdings dibatalkan dan dianggap tidak boleh dikuatkuasakan; (iv) pegangan saham 80% ZZ Holdings dalam ZZ Plantation dan pegangan saham 85% dalam Granright dipulihkan; dan (v) daftar ahli-ahli ZZ Wood, ZZ Holdings, ZZ Plantations dan Granright dibetulkan berikutan s. 162 Akta Syarikat 1965 untuk menunjukkan pertukaran yang diperintahkan dan bahawa notis pembetulan dimasukkan.

Case(s) referred to:

Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA ***(refd)***

African Strategic Investment (Holdings) Ltd and Another v. Main [2011] EWHC 2223 (Ch) ***(refd)***

Asanand v. Jhangi (1919) PWR 2 ***(refd)***

Asia General Equipment and Supplies Sdn Bhd & Ors v. Mohd Sari Datuk Hj Nuar & Ors [2011] 8 CLJ 749 FC ***(refd)***
Babulal v. Chandabai AIR 1989 Karnataka 221 ***(refd)***
Beaman v. A.R.T.S., Ltd (1949) 1 All ER 465 ***(refd)***
Beni Madho v. Basanto Kunbi 35 IC 252 All ***(refd)***
Bhimasingh v. Fakirchand 1948 Nagpur 150 ***(refd)***
Biman Chandra v. Promotho 49 Cal 886 (891) ***(refd)***
BMW Financial Services (GB) Ltd v. Bhagwanani [2007] EWCA Civ 1230 ***(refd)***
Club Cruise Entertainment and Travelling Services Europe BV v. Department for Transport [2008] EWHC 2794 (Comm) ***(refd)***
Fairfax Gerrard Holdings Ltd and others v. Capital Bank plc [2006] All ER (D) 380 ***(refd)***
Fouldes v. Willoughby (1841) 8 M&W 540 ***(refd)***
Giribala v. Ushangini AIR 1955 Assam 177 ***(refd)***
Golam Mujafar v. Goloke 25 Ind Cas 884 ***(refd)***
Gunabai v. Motila 1925 Nagpur 398 ***(refd)***
Indra Nath v. Rooke 37 Cal 81 ***(refd)***
Kalyan Mal v. Ahmad Uddin AIR 1934 Privy Council 208 ***(refd)***
Kashi Ram v. Pragi (1913) 20 IC 538 ***(refd)***
Kong Ming Bank Berhad v. Sim Siok Eng [1982] 1 LNS 12 PC ***(refd)***
Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors & Other Appeals [2012] 1 LNS 775 CA ***(refd)***
Kuwait Airways Corp v. Iraqi Airways Co [2002] 2 WLR 1353 ***(refd)***
Lokenath v. Chintamani 16 Ind Cas 574 ***(refd)***
Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd [1984] 1 CLJ 353; [1984] CLJ (Rep) 251 FC ***(refd)***
Moidiyan's son Punnavil Kuttu v. Raman Nair 1908 Indian Law Reports Madras Series Vol XXXI 230 ***(refd)***
Myddleton v. Lord Kenyon (1794) 2 Ves 391 ***(refd)***
Nanji & Co v. Jatashankaar Dossa AIR 1961 Supreme Court 1474 ***(refd)***
Nibaran v. Nirupama AIR 1921 Cal 131 ***(refd)***
Ningawwa v. Byrappa AIR 1968 Supreme Court 956 ***(refd)***
Nocton v. Ashburton [1914] AC 932 ***(refd)***
Oliver v. Decorby, 2005 SKQB 279 ***(refd)***
Sanderson v. Marsden and Jones (1922) 10 ***(refd)***
Swarnamoyee v. Probodh Chandra AIR 1933 Calcutta 253 ***(refd)***
Tate v. Williamson (1866) 2 Ch App 55 ***(refd)***
Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***
Thunder Air Ltd v. Hilmarsson [2008] All ER (D) 245 ***(refd)***
Wallingford v. Mutual Society (1880) 5 App Cas 685 ***(refd)***
White v. Withers LLP and another [2009] EWCA Civ 1122 ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***
Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari [1950] SCR 852 ***(refd)***
Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2012] 1 LNS 250 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 162
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 18 r. 12(1)(a)
Sabah Limitation Ordinance, ss. 3, 18, item 37, 38, 73, 77, 78, 97
Sarawak Limitation Ordinance, s. 18

Civil Procedure Code [Ind], s. 48
Limitation Act 1908 [Ind], s. 18, arts. 48, 95, 96
Limitation Act 1963 [Ind], s. 17, art. 68
Limitation Act 1939 [UK], ss. 2(1)(a), 26(a), (b)

Other source(s) referred to:
Mogha's, *Law of Pleadings in India*, 16th edn, p 66
MR Mallick, *Limitation Act*, 12th edn, p 303
Sanjiwa Row's, *The Limitation Act*, 9th edn, vol 1, p 775
Spenser Bower, Turner & Handley, *Actionable Misrepresentation*, 4th edn, pp 384-385
UN Mitra's, *Law of Limitation and Prescription*, 11th edn, p 558
UN Mitra's, *Law of Limitation and Prescription*, 12th edn, vol 2, p 1685

For the appellants - Cyrus Das (Raymond Szetu, Tiong Jia Yi & Baldev Singh with him); M/s Baldev Gan & Assocs
For the respondents - Cecil Abraham (Norbert Yapp with him); M/s Norbert Yapp & Assocs

Reported by Ashok Kumar

JUDGMENT

Jeffrey Tan FCJ:

[1] Leave was granted on 29 May 2012 to the appellants to appeal against the order of the Court of Appeal in respect of the matter decided by the High Court of Sabah & Sarawak at Sandakan in the exercise of its original jurisdiction, on the following questions:

A. Limitation under the Sabah Limitation Ordinance for Fraud and Conversion

(i) Whether it is incumbent on a plaintiff seeking the benefit of s. 18 of the Sabah Limitation Ordinance to distinctly allege with particulars the particular fraud (actual or constructive), by which he has been kept from the knowledge of his right of suit against the defendant?

(ii) Where a plaintiff invokes 'concealed fraud' under s. 18, whether it is incumbent for him to plead the acts or particulars of concealment, and of the affirmative action by the defendant by which he was allegedly kept out of knowledge?

(iii) Where concealed fraud is pleaded under s. 18, whether the phrase 'from the time when the fraud first became known to the person' is to be determined on a subjective or objective basis, meaning that a person who chooses to remain indifferent to events around him cannot invoke s. 18?

(iv) In an action for the tort of wrongful conversion in Sabah, whether the applicable limitation period is three years under Item 37 or six years under Item 97 of the Sabah Limitation Ordinance?

B. Actionable Fraud, *Non est Factum* and Conversion

(v) Whether a plaintiff is entitled to succeed on a charge of fraud when the fraud as found by the trial court is not the fraud as pleaded?

(vi) (Where) a plaintiff relies on the type of fraud called equitable or constructive fraud, whether it is incumbent on him to plead the particulars of this class of fraud as would be incumbent on him if he were to plead fraudulent misrepresentation or common law fraud?

(vii) Whether the tort of conversion is committed in relation to shares in a public listed company when the shares remained in the ownership of the true owner and the pledge is disclosed in the audited accounts of the company and duly acknowledged by the directors?

(viii) Whether a plaintiff who relies on the existence of fiduciary duty or any obligation under the Companies Act 1965 must assert and plead it in his statement of claim?

[2] From pleadings and evidence, the background facts to the claim which was allowed by the trial court and affirmed by the Court of Appeal could be summarised as follows. The second and third respondents were founders of the first respondent (Kwan Chee Hang Sdn Bhd - KCH), and parents of the fourth appellant.

The fourth and fifth appellants were spouses. The issued share capital of KCH was divided into 700 Class A shares and 7 million Class B shares. All 700 Class A shares, which conferred special rights to holders, were held by the second and third respondents in the proportion of 630:70 (note: by a special resolution of 29 August 1998, it was resolved that holders of Class B shares would have the same rights and privileges as holders of Class A shares, but on 1 October 2006, it was resolved to reinstate the Class A and Class B shares to the former position). Class B shares were issued equally to the second, third respondents, fourth appellant, and two other children of the second and third respondents, namely Michael Kwan and one Kwan Phui Ha; each held 1.4 million Class B shares.

[3] KCH wholly owned the first appellant (Zung Zang Wood Products Sdn Bhd) (ZZ Wood) (see para. 9 of 121AR read together with para. 7 of 141AR).

[4] ZZ Wood held 80% of the equity of ZZ Holdings (see 3007AR). The fourth appellant held the balance 20%. However, the appellants pleaded that up and until 3 June 2003, ZZ Wood only held 80% of the issued share capital of ZZ Holdings while the fourth appellant held the balance 20% by an allotment of 9,998 shares in the capital of ZZ Holdings pursuant to a special resolution dated 24 March 1998.

[5] In turn, ZZ Holdings held 80% of the equity of ZZ Plantation; the balance 20% was held by the fourth appellant. The appellants pleaded that the latter shareholdings were varied by subsequent allotments and or transfers dated 1 December 1998 (150,000 shares to ZZ Holdings), 25 March 1999 (190,000 shares to ZZ Holdings and 60,000 shares to fourth appellant), and 1 July 2001 (75,000 shares to ZZ Holdings). Nevertheless, it remained that ZZ Holdings held 80% of the equity of ZZ Plantation.

[6] According to the pleaded case of the respondents (see 156AR), as at 30 June 1998, ZZ Holdings held 170,000 shares in capital of the sixth respondent (Granright Enterprise Sdn Bhd - Granright), while the fifth appellant held the balance 30,000 shares. According to the appellants, ZZ Holdings acquired its 170,000 shares in the capital of Granright from the fourth appellant (see 188AR). Still, it remained that ZZ Holdings held 85% of the equity of Granright.

[7] The corporate structure of KCH and its subsidiaries was not intricate. KCH held the entire equity of ZZ Wood. In turn, ZZ Wood held 80% of the equity of ZZ Holdings. And in turn, ZZ Holdings held 80% of the equity of ZZ Plantation and 85% of the equity of the sixth appellant (Granright Enterprise Sdn Bhd - Granright). The balance equity of ZZ Holdings, ZZ Plantation and Granright was held by the fourth and or fifth appellants. At most, ZZ Wood held 80% of the equity of ZZ Holdings, and ZZ Holdings held 80% of the equity of ZZ Plantation and 85% of the equity of Granright.

[8] The third and sixth appellants owned substantial tracts of oil palm plantation (1133.5 and 390.41 hectares respectively) in the State of Sabah. ZZ Wood was the link company, so to speak. Without control of ZZ Wood, KCH would lose control of all its subsidiary companies. And without control of ZZ Holdings in particular, KCH would lose control of ZZ Plantation, Granright and its prized plantations. In June 2003, it transpired that KCH had absolutely no direct and or indirect interest in the equity of ZZ Wood and ZZ Holdings.

[9] Briefly stated, in Suits No: S22-24-2008 (Suit 24) and S22-26-2008 (Suit 26) which were consolidated as one action, the second and third respondents claimed, *inter alia*, that the fourth and fifth appellants fraudulently diluted and or divested the interests of KCH in its subsidiary companies by the allotment and or transfers of the shares of KCH in the capital of ZZ Wood and the transfer of the shares of ZZ Wood in the capital to ZZ Holdings to themselves, and thus acquired an absolute interest in all subsidiary companies. In Suit No: S22-39-2008 (Suit 39), the first respondent claimed that the fourth appellant wrongfully converted its property, namely 1.55million shares in the capital of Tekala Corporation Bhd (Tekala shares), in that the fourth respondent pledged those Tekala shares to Peninsular Securities Sdn Bhd as security for a share margin trading account facility granted to him or his order. By consent, all three suits were tried together.

[10] As pleaded in Suit 24, the specific complaints of the respondents were:

(a) that without the knowledge of the third respondent, the share capital of ZZ Plantation was increased from RM100,000 to RM500,000 and the increased share capital

A was allotted to the fourth appellant (50,000 shares), the fifth appellant (300,000 shares) and to the third respondent (150,000 shares) as trustee for the daughter of the fourth and fifth appellants,

B (b) that on 2 April 1998, the fourth appellant fraudulently caused or procured the directors of ZZ Plantation to allot 99,900 shares in the capital of ZZ Plantation to ZZ Holdings (85,000 shares) and himself (14,900 shares),

C (c) that on 30 November 1998, the fourth appellant fraudulently caused or procured the directors of ZZ Plantation to allot 150,000 shares in the capital of ZZ Plantation to ZZ Holdings, and to execute the requisite Form 11 for registration,

D (d) that on 30 November 1998, the fourth appellant caused or procured the members of ZZ Plantation to pass a special resolution to increase the share capital of ZZ Plantation from RM100,000 to RM500,000, and to execute the requisite Form 11 for registration,

E (e) that on 25 March 1999, the fourth appellant caused or procured the directors of ZZ Plantation to allot 250,000 shares in the capital of ZZ Plantation to ZZ Holdings (190,000 shares) and the fourth appellant (60,000 shares) and to execute the requisite Form 11 for registration,

F (f) that on 4 June 2003, the fourth appellant falsely and/or fraudulently procured the second and third appellants and one other director, namely Michael Kwan, to execute a directors' resolution of KCH, purportedly approving the disposal of ZZ Wood to himself,

G (g) that by resolution dated 23 October 2003, the fourth and fifth appellant fraudulently resolved to accept an undated letter of resignation of the second respondent as a director of ZZ Plantation, thereby giving absolute control of the board of ZZ Plantation to the fourth and fifth appellants and also thereby keeping the second and third respondents away from all knowledge of the affairs of ZZ Plantation,

H

I (h) that in early 2006, the respondents discovered that the fourth appellant had wrongfully and or fraudulently caused KCH to lose control and ownership of ZZ Plantation,

(i) that unbeknown to KCH, the fourth and fifth appellants, by a purported resolution dated 3 June 2003, caused ZZ Wood to dispose its 80% shareholding in ZZ Holdings to themselves, thereby making themselves the absolute owners of ZZ Holdings and ZZ Plantation,

(j) that as a result of the aforesaid, the fourth and fifth appellants fraudulently acquired the 80% shareholding of ZZ Wood in ZZ Holdings, and KCH was deprived of ownership of ZZ Plantation and the oil palm plantation.

[11] As pleaded in Suit 26, the specific complaints of the respondents were:

(a) that on 4 June 2003, the fourth appellant falsely and/or fraudulently procured the second and third respondents and Michael Kwan to execute a directors' resolution of KCH, approving the disposal of the entire shareholding of KCH in the capital ZZ Woods to himself,

(b) that unbeknown to KCH, the fourth and fifth appellants caused to be passed a resolution of ZZ Woods and dated 3 June 2003, disposing of its entire 80% shareholding in the capital of ZZ Holdings,

(c) that as a result of the aforesaid, the fourth and fifth appellants fraudulently acquired the 80% shareholding of ZZ Woods in ZZ Holdings, and KCH was deprived and divested of its ownership of Granright and the oil palm plantation.

(d) that in early 2006, the respondents discovered that the fourth appellant had wrongfully and/or fraudulently caused KCH to lose control and ownership of Granright.

[12] And as pleaded in Suit 39, the specific complaints of the respondents were:

(a) that upon enquiries made in 2006, the respondents discovered that between October 1996 and August 1998, the fourth appellant wrongly converted the property of KCH, in that the fourth appellant pledged the Tekala shares (1.55m) to Peninsular Nominees (Tempatan) Sdn Bhd as security for loan facilities granted to the fourth appellant or his order.

[13] (The background facts of this case were fully summarised in *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2012] 1 LNS 250; [2012] 5 MLJ 319, CA)

[14] Wheat should be separated from the chaff. Suits 24 and 26 consisted of two sorts of 'complaints'. One related to the increase in the share capital of ZZ Plantation and the allotment thereof to ZZ Holdings and fourth appellant in 1998/1999, while the other related to the disposal of ZZ Wood's 80% equity in the capital of ZZ Holdings to the fourth and fifth appellants on 3 June 2003, and the disposal of KCH's 100% equity in the capital ZZ Wood to the fourth appellant on 4 June 2003. One concerned acts or deeds in 1998/1999 while the other had to do with acts or deeds in June 2003. They were horses of different colours. One was the bark, while the other was the bite, so to speak. The complaint that would bite in Suits 24 and 26 was the alleged fraudulent disposal of ZZ Wood's 80% equity in the capital of ZZ Holdings to the fourth and fifth appellants on 3 June 2003 and the alleged fraudulent disposal of KCH's 100% interest in the capital of ZZ Woods to the fourth appellant on 4 June 2003. That was the complaint that mattered, for it was the alleged disposal of the shares of KCH in the capital of ZZ Wood and the disposal of the shares of ZZ Wood in the capital of ZZ Holdings in June 2003 that allegedly caused KCH to lose control of ZZ Plantation and Granright, and its prized plantations. The complaint on the fraudulent increase in the share capital ZZ Plantation and the allotment thereof to ZZ Holdings and to the fourth appellant in 1998/1999 did not matter, for it was not the increase in the share capital of ZZ Plantation and the allotment thereof in 1998/1999 to ZZ Holdings and fourth appellant that allegedly caused KCH to lose ZZ Plantation and Granright. To the contrary, the increase in the share capital of ZZ Plantation and the allotment thereof to ZZ Holdings and fourth appellant resulted in no loss to KCH. That was admitted by Michael Kwan (PW1) who agreed that the allotment of the increased share capital of ZZ Plantation was in the proportion of the members' shareholdings (see 254 - 255AR). It was not the acts or deeds in 1998/1999 that allegedly caused KCH to suffer its alleged loss. It was the alleged fraudulent disposal of the shares of KCH in the capital of ZZ Wood and the shares of ZZ Wood in the capital of ZZ Holdings in 2003 that allegedly resulted in KCH being without the prized plantations.

[15] To those claims of fraud in 2003, the appellants raised, *inter alia*, the defence of limitation under Items 37, 38, 73, 77 and/or 78 of the Sabah Limitation Ordinance (SLO) (see 149AR and 191AR). To the claim in Suit 39, the fourth appellant pleaded that KCH in 1997 consented to the pledge of those Tekala shares, and that the action was time barred by Item 97 (see 204AR). The trial court held, and the Court of Appeal agreed, that time accrued in early 2006 when the respondents first learnt (as pleaded in the statement of claim) that the plantations were no longer in the hands of KCH and that the Tekala shares had been pledged by the fourth appellant. The trial court granted the reliefs sought by the respondents. The Court of Appeal affirmed those orders.

[16] Learned counsel for the appellants submitted that the issue of limitation traversed all three appeals before us. That observation was not out of place, for in the main the leave questions had to do with s. 18 of the SLO and the particulars to be pleaded thereunder. It is therefore fitting that we should first impart our understanding of s. 18 of the SLO.

[17] Section 3 of the SLO provides that suits instituted after the period of limitation are to be dismissed. Section 3 reads: "Subject to s. 4 to 24, every suit instituted after the period of limitation prescribed therefore by the Schedule shall be dismissed: Provided that limitation has been set up as a defence." The specific periods of limitation are stated in the Schedule to the SLO. However, those specific periods of limitation in the Schedule could be postponed or suspended. Section 18 of the SLO provides:

> When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right of title on which it is founded, or where any documents necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit:
>
> (a) against the person guilty of the fraud or accessory thereto, or
>
> (b) ...
>
> (c) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

[18] Section 18 of the SLO is *in pari materia* with s. 18 of the Sarawak Limitation Ordinance. And in relation to s. 18 of the Sarawak Limitation Ordinance, in *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd* [1984] 1 CLJ 353; [1984] CLJ (Rep) 251; [1984] 2 MLJ 39, the Federal Court per Syed Agil Barakbah FJ imparted the following historical backdrop:

> Section 18 is *in pari materia* with s. 18 of the Indian Limitation Act, 1908 prior to the amendment in 1963 by the new s. 17 of the Indian Limitation Act, 1963 which is recast on the lines of s. 26 of the Limitation Act, 1939 of England. It says that the period of limitation prescribed by the Act does not begin to run in certain cases of fraud until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. (emphasis added). **The words emphasised or words to the effect do not appear in s. 18 of our Limitation Ordinance**. As in the relevant section of the 1908 Indian Act, s. 18 of our Ordinance says that where a person is kept from the knowledge of the fraud of another person, limitation is computed from the time when the fraud became known to the person injuriously affected thereby. The difference in the language is significant in that mere suspicion or hearsay knowledge is not enough. **There is no requirement to put a prudent man or diligent man into enquiry as is required in the new Indian or the English Act on which the former is modelled**. (See B.B. Mitra on the *Limitation Act*, 1963, 17th edn. p. 215). The requirement has therefore no application in Sarawak. (emphasis added)

[19] The *Limitation Act* by M.R. Mallick, 12th edn. at p. 303 and Sanjiwa Row's *The Limitation Act*, 9th edn. vol. 1 at p. 775 identically observed that "In the old Act stress is laid on the knowledge of the person who wants to avail of the enlarged period. In the new Act, emphasis is laid on the date when the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it."

[20] There are further differences between s. 18 of the SLO and s. 17 of the Indian Limitation Act 1963 (ILA 1963). "Section 17 of the ILA 1963 provides for cases based on fraud and for relief founded on mistake and repeals arts. 95 and 96 of the ILA 1908. The section differs from (s. 18 of the SLO) in two respects: (1) whereas the fact that the suit or application is based merely on fraud will not suffice, under s. 18 of the repealed Act it should be further shown that by means of such fraud the person injured was kept from knowledge of his right to sue. (2) Limitation now

starts from the date of discovery of the fraud and not from the time when the fraud first became known to the person injured" (UN Mitra's *Law of Limitation and Prescription,* 11th edn. at p. 558).

[21] Since the SLO is based on the Indian Limitation Act 1908, (ILA 1908) it is therefore important not to base "argument by analogy from the English Statute but on the Indian legislation ... Argument by analogy from the English law may result, therefore, in error, whereas the Indian and Malaysian case law is a useful guide to the interpretation of the Ordinance" (*Kong Ming Bank Berhad v. Sim Siok Eng* [1982] 1 LNS 12; [1982] 2 MLJ 205, 206 per Lord Scarman). In the case of the SLO, the Indian legislation to follow as guide is the ILA 1908, even though it has long been repealed and replaced by the ILA 1963. The more pertinent authorities must necessarily be those that touched on the ILA 1908.

[22] Also, it is salutary to note that s. 18 of the ILA 1908 only applies "when the plaintiff has been kept from the knowledge of his right to do a certain thing by fraud of the other party, and not, where he has been kept from exercising his right – *Golam Mujafar v. Goloke* 25 Ind Cas 884 ... This section applies only to such fraud as amounts to concealment and is intended to keep from the injured the knowledge of the wrong or its remedy ... The mere act of fraud is immaterial. The plaintiff or applicant must show that he has by means of the fraud been kept from the knowledge of his right to institute a suit or make an application – *Asanand v. Jhangi* (1919) P.W.R. 2; *Biman Chandra v. Promotho* 49 Cal 886 (891) ... the mere ignorance of the plaintiff as to his right to sue is no excuse under this section. It is only where such ignorance has been brought about by the fraud of the other party that this section applies – *Lokenath v. Chintamani* 16 Ind Cas 574 ... The fraud must be proved by the person alleging it ... where the allegations in the plaint do not themselves necessarily imply fraud on the part of the defendant, nor suggest any such imputation, s. 18 would have no application. On the other hand, if the facts stated in the plaint necessarily suggest fraud on the part of the defendant, the mere omission in the plaint to expressly stigmatise the defendant's conduct as fraudulent would be no bar to the plaintiff relying on the provisions of this section" (H C Mitra's *Indian Limitation Act 1908* at pp. 118-121).

[23] In *Swarnamoyee v. Probodh Chandra* AIR 1933 Calcutta 253, the court (Mukerji and Guha JJ) held that the circumstances under which and the extent to which reliance could be placed on s. 18 of the ILA 1908 were well settled:

> Except when the plaintiff's knowledge is an ingredient of his cause of action, the plaintiff's ignorance of his right to sue does not prevent time from running against him. But it is otherwise if such ignorance is brought about by the fraud of the defendant. In order to constitute fraud there must be some abuse of confidential position, some intentional imposition, or some deliberate concealment of facts: a designed fraud, by which the party knowing to whom the right belongs conceals the facts and circumstances giving that right. The right of the party so defrauded is not affected by lapse of time, or by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed.

[24] We need say no more on s. 18 of the ILA 1908. In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O. 18 r. 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). "When fraud is alleged it must be specifically pleaded. (The) mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v. Mutual Society* (1880) 5 App Cas 685 at p. 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v. Lord Kenyon* (1794) 2 Ves 391 at p. 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given" (Spenser Bower, Turner and Handley, *Actionable Misrepresentation,* 4th edn. at pp. 384-385).

[25] In *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703; [2009] 2 MLJ 672, Gopal Sri Ram JCA, as he then was, summarised the law as follows:

> The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Bhd v. Lim Tee Yong* [1994] 4 CLJ 558 it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In *Lee Kim Luang v. Lee Shiah Yee* [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 the High Court

held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O. 18 r. 8(1) of the RHC. It is not to take the other party by surprise. In fact Lord Denning MR in *Associated Leisure Ltd & Ors v. Associated Newspapers Ltd* 2 MLJ 672 at 677 [1970] 2 QB 450 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it'.

[26] The reason for fraud to be pleaded with particulars is because "the word 'fraud' does not mean anything more than what is stated. When you plead fraud, the particulars must be pleaded ... mere general allegations of fraud are insufficient to constitute a pleaded case of fraud" (*Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; [2011] 1 MLJ 752 per Abdul Malik Ishak JCA).

When fraud, deliberate concealment or mistake is relied upon as postponing the limitation period, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision" (*Halsbury's Laws of England* 5th edn. Vol. 68 para. 948; see also Halsbury's *Laws of Malaysia* 2006 Reissue Vol. 21 para. 510.041). "He must clearly state how he was kept from knowledge ..." (*Babu Das Narani Singh v. Muhammad Yusof* (1921) 41 IC 823). "It is necessary that there must be something said or done which was directly introduced to keep the plaintiff from knowledge of his right to sue or apply. This is the interpretation of the old s. 18 of the Limitation Act 1908 which is now s. 17 with modifications" (*The Limitation Act* by M.R. Mallick (*supra*) at 306).

[27] In *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121; [2011] 4 MLJ 346, Gopal Sri Ram JCA, as he then was, held:

Rustomji on the *Law of Limitation and Adverse Possession* (7th Edn.), a leading work on the subject, has this comment to make (at p. 306 of the text) on the Indian equipollent of s. 18 (*viz* s. 17 of the Limitation Act 1963):

> There must be some affirmative act designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence or passiveness (there being no fiduciary relation or act of the party calculated to deceive or lull inquiries) is not fraudulent concealment.

If you apply that to the present case, you will see that there was no affirmative act on the part of the defendant designed to prevent the discovery of the right of action. The defendant merely

A remained silent at the general meeting. On the authorities this is insufficient. In the first place the parties do not stand in a fiduciary position to each other. In the second place, there was no act on the part of the defendant to deceive or lull the plaintiff into making inquiries into the facts relevant to his right to bring an action for libel.

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[28] There will nonetheless be acts which give rise to the right of action, where there may not be any affirmative action on the part of the defendant, that is, after the act, to prevent the discovery of the right of action. " ... there could be fraudulent C concealment of a right of action, which was not subsequent to the act which gave rise to the right of action, but acquired its character from the manner in which the act was performed" (*Beaman v. A.R.T.S., Ltd* (1949) 1 All ER 465 per Lord Greene MR). A surreptitious conversion of specific property is one clear D example.

[29] In *Beaman v. A.R.T.S.*, the owner of four packages deposited them with a company for storage. Storage charges were paid until 1938. The owner intimated to the company that the E packages were of value to her. Prevented by war from returning to England, she wrote in January 1940 and asked the company to send the packages to her at Athens where she would collect them. But, owing to the entry of Italy into the war, this became impossible. The company, being Italian-controlled, wished to close F down its business. In August 1940, without informing the owner, the company examined the contents of the packages and decided they were worthless. The company gave the contents to the Salvation Army. It made no attempt, then or subsequently, to communicate with the owner and made no full entry in its books G regarding what had been done with the goods. In 1946, the owner returned to England and claimed the packages. On 20 November 1946, after being informed of the position, she started an action against the company for damages for conversion. The company pleaded the Limitation Act 1939, s. 2(1)(a), but it H was contended by the owner under s. 26 of the Act that the period of limitation was postponed because the action was "based upon the fraud" of the company or "the right of action was concealed by (its) fraud," within the meaning of s. 26(a) and (b) respectively. Lord Greene M.R. held that the action was not I based on fraud.

> In my opinion, the plaintiff's argument under s. 26(a) fails on the ground (not accepted by Denning J) that the action is not based on fraud. It must be borne in mind that s. 26 is a section of

general application. It applies to every sort of action which is affected by the Act. Of these many can properly be said to be based on fraud, eg, an action for damages for deceit and an action claiming rescission of a transaction brought about by fraud. In all such cases fraud is a necessary allegation in order to constitute the cause of action. In other actions covered by the Act fraud is not a necessary allegation at all and the action of conversion is one of them.

...

When the relevant facts are considered in their proper perspective, the conduct of the defendants did, in my opinion, amount to a fraudulent concealment of the cause of action. 'Denning J having found that the actions of the defendants were not fraudulent so as to make the action one "based upon ... fraud," only found it necessary to consider s. 26(b) on the assumption that the conversion was in its origin an innocent one, and that, unless there was some subsequent fraudulent concealment, para (b) would not apply. I may say at once that no subsequent active concealment of a fraudulent nature is relied on. This, however, does not mean that the defendants' failure to make any attempt to inform the plaintiff of what they had wrongfully done with her property is, in the circumstances, to be disregarded. It must be interpreted in relation to their previous actions.

There may, in my opinion, be fraudulent concealment of a right of action which is not subsequent to the act which gives rise to the right of action. It may acquire its character as such from the very manner in which that act is performed. It is not, I think, a right construction of the statute of 1939 to confine fraudulent concealment to what counsel for the defendants described as "fraud in the ordinary sense." This, as far as I understood him, meant fraud which in its nature is sufficient to give rise to an independent cause of action. This definition would exclude the wide range of conduct which before the statute was regarded in equity as so dishonest as to prevent the statute of limitations (or its analogous application in equity) from coming into operation. As this is an amending statute, it would, of course, have been open to the legislature to effect so sweeping a change in the law. If it had done so, a striking result would have followed. Provided an action was not based on fraud and provided there was not any subsequent active concealment of a fraudulent nature, the wrongdoer would have obtained the benefit of the statute, however furtively or surreptitiously the act complained of was committed. The manner in which equity treated, for example, a tort surreptitiously committed when the statute of limitations (or its analogous application) was pleaded, is illustrated by the case of

A the secret abstraction of underground minerals. In *Bulli Coal Mining Co v. Osborne* the Privy Council had to consider such a case. If the appellant in that case had merely been guilty of trespass, the ordinary six-year period of limitation would have applied, but the very manner in which the trespass was committed was a surreptitious one. Lord James of Hereford, delivering the judgment of the Board, said ([1899] AC 363):

> The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as 'a secret thing' and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.

[30] Pertinently, in the last paragraph of his opinion, Lord Greene MR said:

> I am of opinion that the conduct of the defendants, by the very manner in which they converted the plaintiff's chattels in breach of the confidence reposed in them and in circumstances calculated to keep her in ignorance of the wrong that they had committed, amounted to a fraudulent concealment of the cause of action. When she came to claim her goods she expected to find them waiting for her. The fact that she did so expect was due to the manner in which the defendants had chosen to act. This, in the circumstances, can, in my opinion, only be described as furtive and surreptitious. The appeal is allowed.

[31] As seen from *Beaman v. A.R.T.S.*, there could be torts which give rise to a cause of action where mere silence would conceal the discovery of the right of action. Thus, in *Giribala v. Ushangini* AIR 1955 Assam 177, where the agent, who managed the property and the collection and payment of revenue for the plaintiff, surreptitiously used the funds of the plaintiff to purchase the disputed properties, it was held that as the agent was guilty of not disclosing the fact of purchase, there was concealment and the plaintiff was entitled to the fullest advantage of s. 18 of the

ILA 1908 (see pp. 180-181 of the report). Thus, where the character of concealment is acquired from the manner of the performance of the act which gives rise to a cause of action, the particulars of concealment could be so self-evident that they need not be further pleaded.

[32] In the instant case, with respect to the alleged surreptitious conversion, the means of concealment should be self-evident. It was an alleged surreptitious conversion. That it was alleged as surreptitious were sufficient pleadings that silence was the means of concealment. But the particulars of the means of concealment with respect to the right of action in relation to the alleged fraudulent transfers of shares in 2003 must be pleaded. But there were no pleadings in the statements of claim in Suits 24 and 26 that reliance was placed on s. 18 of the SLO. It was only after the plea of limitation that the respondents pleaded, in the reply, that:

> The Plaintiffs deny that the Plaintiffs' cause of action is time barred. The Plaintiffs say that the matters complained of only came to light in early in early 2006. The Plaintiffs will also rely on s. 18 of the SLO (see 133 and 179AR).

[33] There were also no pleadings in the statement of claim in Suit 39 that reliance was placed on s. 18 of the SLO. Again, it was only after the plea of limitation was raised that the respondents pleaded, in the reply, that:

> The Plaintiff says that the audited accounts of the Plaintiff for the year 1998, 1999, 2000, 2001, 2002, 2003 and 2004 respectively were only finalised in or about 15.3.2005 and as such the questions of the Plaintiff being aware of the defendant's wrongful acts since 1998 and this claim being barred by the statute of limitation, do not arise at all. Furthermore, the Defendant has expressly declared in the said audited accounts that he is the director primarily responsible for the financial management of the Plaintiff [company] (see 207AR).

[34] In Suits 24 and 26, the respondents placed reliance on s. 18 of the SLO. In Suit 39, the respondent placed no reliance on s. 18 of the SLO. But where reliance was placed on s. 18 of the SLO, there were no particulars of the means of concealment. There were particulars of fraud with respect to the alleged fraudulent disposal of the shares of KCH and ZZ Wood in 2003 (see paras. 14 to 22 of the amended statement of claim in Suit 24 and in paras. 16 to 21 of the statement of claim in Suit 26).

The particular kind of fraud (actual or constructive) was not classified by the respondents. But there was no requirement for that to be classified. There was also no requirement that the means by which the respondents were kept from knowledge of their right to institute action be classified as actual or constructive. "Conclusions of law, or of mixed law and fact, are no longer to be pleaded. It is for the court to declare the law arising from the facts proved before it" (*Odgers on Civil Court Actions* 24th edn. at p. 151). What was required of the pleadings was that the appellants had adequate notice of the case to meet. The pleading of fraud with particulars was enough for the appellants to know what to answer. With those particulars, there was notice of the kind of fraud alleged. It is not the label to it, but the pleaded facts that determine the ultimate classification of the kind of fraud. Whether it is actual, constructive or equitable fraud is not for the pleader but for the trier to find. So in *Nocton v. Ashburton* [1914] AC 932, "the House of Lords held that the statement of claim supported a cause of action for equitable fraud involving a breach of fiduciary duty which entitled the plaintiff to relief, although a charge of common law fraud failed at the trial, and the charge of equitable fraud did not emerge until the case reached the House of Lords" (Spenser Bower, Turner and Handley, *Actionable Misrepresentation*, *supra* 4th edn. at p. 386).

[35] But without the particulars of concealment in Suits 24 and 26, the respondents could not rely on s. 18 of the SLO. Therefore, we could not agree with the courts below that in Suits 24 and 26 the respondents could rely on s. 18 of the SLO to postpone the period of limitation (see *Babulal v. Chandabai* AIR 1989 Karnataka 221, where it was not alleged nor established that the plaintiff was kept in the dark about her right to seek the accounts, the court held that s. 17 of the ILA 1963 could not help her).

[36] In *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari* [1950] SCR 852, an application for execution of a decree was made after the expiry of twelve years from the date of the decree and three years from the date of the final order on the last application for execution. The decree-holder contended that he was entitled to make an application even after the expiry of twelve years. The High Court found that as the decree-holder was prevented by the fraud of the judgment-debtor from executing the decree, the application was not barred by under s. 48 of the Civil Procedure Code, but as it was made more than three years from

the date of the order on the last application it was barred under art. 182 of the Limitation Act 1908. The decree-holder appealed, contending for the first time before the Supreme Court that as fraud was proved, s. 18 of the ILA 1908 was applicable to the case and his application was not barred by the said art. 182 as it was made within three years when he became aware of the fraud and the proper article applicable was art. 181. The Supreme Court held that "when a question of law is raised for the first time in a court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea" (see p. 861 of the report). However, the Supreme Court found that the facts necessary to establish fraud under s. 18 of the ILA 1908 were neither admitted nor proved. Then on s. 18 of the ILA 1908, the Supreme Court explicated:

> Concealing from a person the knowledge of his right to apply for execution of a decree is undoubtedly different from preventing him from exercising his right, of which he has knowledge. Section 18 of the Limitation Act postulates the former alternative" (see page 863 of the report).

[37] The Supreme Court held that the decree-holder could not get the benefit of s. 18 of the ILA 1908. Having made that finding, the Supreme Court then held that the fact that the application was not barred under s. 48 of the Civil Procedure Code, did not obviate the necessity of considering whether it was barred under art. 182. In the case of art. 182, there was no separate period of limitation in the case of the fraud of the judgment–debtor in the third column. At pp. 866-867 of the report, the Supreme Court held:

> Affirmatively, by the inclusion of s. 18 in the Limitation Act, and negatively, by not providing for a separate period of limitation in the case of the fraud of the judgment–debtor in the third column in the articles, the Legislature has clearly intended that unless advantage could be taken by the decree-holder under s. 18 on the ground of the fraud of the judgment-debtor, fraud does not give any other relief under the Limitation Act.

[38] *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari* illustrates the correlation between s. 18 of the SLO and the Items. Section 18 of the SLO is the overarching provision. Time could be enlarged under s. 18 of the SLO where a suit would otherwise be time-barred under the Items. Conversely, where s. 18 of the SLO is not available, the period of limitation is as

prescribed in the third column of the applicable Item. Since the respondents could not rely on s. 18 of the SLO, then all three suits must stand or fall on the period of limitation as prescribed in the applicable Item in the Schedule.

[39] Items 37 and 77 provide a separate period of limitation in the third column.

[40] Item 37 which provides that where a suit is of the description "for specific movable property lost, or acquired by theft or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same", the period of limitation is three years to run "when the person having the right to possession of the property first learns in whose possession it is" is in identical terms with art. 48 of the ILA 1908, the scope of which is the following:

> Limitation runs from the time when the plaintiff first learns in whose possession the property is. Where plaintiff entrusted certain jewel to a person for sale, and the latter pledged it for his own use, a suit by the plaintiff to recover the jewel or its value from the pawnee is governed by this Article, and would be in time if brought within three years from the date on which the plaintiff knew that the jewel was in the possession of the pawnee - *Seshappier v. Subramania*, 38 Mad. 783, affirmed on appeal in 40 Mad. 678" (HC Mitra's *Indian Limitation Act 1908* (*supra*) at p. 277).
>
> Government promissory notes, title deeds of property, **share certificates** and books, mortgage deeds and other documents are specific property (*The A.I.R. Manual* 3rd Edition Vol 13 at page 916) (emphasis added)

Conversion Claim

[41] Suit 39 was grounded on conversion of specific movable property. Undoubtedly, the applicable Item was Item 37 which provides that time shall be computed from first knowledge "of the possession it is". For the tort of conversion, the applicable Item is 37 and not 97 of the SLO as both courts below had believed. Time shall be computed when the respondents first learnt that the Tekala shares had been converted by the fourth appellant. Under Item 37, the fraudulent means of concealment is not a constituent. The means of concealment is only a constituent if s. 18 of the SLO were relied upon. In any case, in Suit 39, there was no reliance on s. 18 of the SLO. Accordingly, in relation to the starting point of limitation in Suit 39, the critical particular was

when the respondents first learnt that the fourth appellant had "surreptitiously" converted the Tekala shares, not when they first learnt that KCH had lost its plantations.

[42] The respondents pleaded that they first learnt of the alleged conversion in early 2006 (see 196AR). In its statement of defence, the fourth appellant pleaded that the pledge of the Tekala shares to Peninsular Securities Sdn Bhd for the grant of a share margin account trading facility to the fourth appellant was disclosed in the 1998 and subsequent accounts of KCH (see 204AR). In their reply, the respondents pleaded that the audited accounts of KCH for years 1998 to 2004 were only finalised on 15 March 2005 (see 207AR).

[43] In his witness statement, the second respondent affirmed that after he was alerted by a shareholder of Tekala that the fourth appellant had more Tekala shares than him, he confronted the fourth appellant who told him that he (fourth appellant) purchased those Tekala shares from the open market with a bank loan, and that he (second respondent) then enquired from Michael Kwan who told him (second respondent) that the fourth appellant took a substantial portion of the Tekala shares and pledged them to banks for his (fourth appellant) own purpose (see answer 51 at 195AR). Under cross examination, the second respondent testified as follows (see 425-427AR):

> Q980 Under Q and A49 of your witness statement PW2 WS, you talked about owning Tekala's shares. When did you first realize that your youngest son had pledged some of the shares as security for his own share trading account?
>
> A I can't recall the date but it was at the time when one of the shareholder ask me how come my youngest son have more share than me. After that when I checked, I found out that my youngest son has taken the 100 over shares from my shares.
>
> Q981 Did you confront your youngest son about these shares?
>
> A Yes, I confronted him at the warehouse. He cried and informed me that the shares was bought by him and he has to pay RM50,000 per month for the bank loan.
>
> A982 I put it to you that what you just stated about your youngest son is untrue. He did not cry nor did he say he bought the shares from the open market through the bank loan.

A He did not say he bought the shares from open market. What he informed me at that time was he bought the shares and he must pay RM50,000 for the bank loan when I confronted him why he took the 100 over shares from my shares.

Q983 Are you now saying that Mathew informed you that he bought the shares from the first plaintiff's company instead from open market, is that what you said?

A When one of my friend which is also a shareholder asked me how come my youngest son has more shares than me, then I confronted my youngest son why you took my 100 over shares then he informed me that he did not take mine, he bought the shares and need to pay for the bank loan. I did not know from where he bought his shares.

Q984 I put it to you that as early as 1999 the pledged of Tekala's shares as a security for facilities granted to Mathew had been fully disclosed in the financial statement of the company from 1999 onwards and you had noticed of this pledge all along. Do you agree?

Mr Yap: I object to the put question in relation to the allegation that as early as 1999 the shares were disclosed in the financial statement of the company. The document itself before the court shows that the records of financial statement were finalized in March 2005. The basis of that put question is without foundation.

Court: Ask question subject to the fact the financial statement were finalized in March 2005.

Q985 Referring to pp. 171 of PBD1 and says this is noted in item 10 and although these consolidated accounts were signed in March 2005, you had signed the company level accounts much earlier. Do you agree?

A I am not sure about this because I do not understand English. As far as I know I asked him to pass the account book to me after account has closed but he never pass(ed) the account book to me.

Q986 When you signed the consolidated accounts on 15 March 2005 you must have discovered the pledge of Tekala's shares for Mathew on trading account then why did you only raise this issue at the EGM of October 2006, why the delay?

A At that time how (he did the transaction) of the shares I did not know. I have asked him about the shares but he cried and said he bought the shares. All the years he had never shown me the accounting book or the account records, when he told me the documents was for the purpose of declaring tax so I just signed the document. Even the accounting record for the past few years which I asked from him, he had not show(n) it to me, even until today.

[44] The second respondent could not say when the respondents first learnt of the conversion of the Tekala shares. However, the trial court held that the respondents only knew of the conversion in 2006, on account of the following testimony of Michael Kwan:

As to the Defendants' contention that the action herein is time barred, I find that time only starts to run in 2006 when the Plaintiffs first come to know of the conversion. This is what PW1 had said in his Witness Statement.

57. Q: Are the 3,207,749 shares still registered in the name of Kwan Chee Hang Sdn Bhd?

A: No. In 2006, the company discovered that only 1,657,749 shares out of the 3,207,749 shares were registered in the name of Kwan Chee Hang Sdn Bhd or beneficially owned by Kwan Chee Hang Sdn Bhd.

58. Q: How did you find out about the missing shares?

A: From our company auditors, Messrs Ernst & Young *vide* their letter dated 10.05.2006.

59. Q: Refer to the letter dated 10.05.2006 at page 407 of PBD4. What is this document?

A: This is the letter from Ernst & Young regarding our investments in Tekala Corporation Berhad.

[45] The issue of limitation in Suit 39, the trial judge concluded:

As to the Defendants' contention that the Plaintiffs could have discovered the conversion through the annual audited accounts, I find that it is an established fact that the accounts were only finalized on or about 15.03.2005 when the Plaintiffs had the opportunity to view the accounts. I find that it is not possible for the other members of the Board of Directors to know of DW1's unlawful action from the 1998 audited accounts because the financial statement for the year ended 30th September 1998 was

A only finalized on 15/3/2005. As such I find that this action is filed well within the 6 years limitation period [item 97 of the Schedule of Sabah Limitation Ordinance]. Hence, I find that the defence of limitation raised by the Defendant is without merits.

B **[46]** On that finding, the Court of Appeal agreed with the trial court:

Next, the Tekala suit filed in August 2008 was based on the tort of wrongful conversion for which no period of limitation is provided in the Schedule. That being the case, the period of C limitation prescribed in Item 97 of the Schedule applies. It is six years from the time when the right accrues ie in 2006 when the plaintiffs came to know of the wrongful conversion occasioned by Mathew and Elaine. Hence, the Tekala suit is well within the six-year limitation period. Item 97 was also relied on and pleaded by the defendants in para 9 of their defence dated 4 February 2009.

D

…

In the Tekala suit, Mathew did not deny that the Tekala shares belonged to the Ultimate Holding Co. However, he claimed that he had the Ultimate Holding Co's consent to pledge the shares E and/or the Ultimate Holding Co was aware of the pledge as it was reflected in the Ultimate Holding Co's audited accounts for the year 1998 onwards. However, Mathew was unable to produce the so-called consent. Next, the 1998 audited accounts including the financial statement for the year ended 30 September 1998 was only finalised on 15 March 2005, and so the other directors were F not aware of Mathew's wrongful acts in 1998.

[47] Both courts below found that the respondents only knew of the conversion in 2006. But learned counsel for the appellants submitted that time accrued upon release of the accounts in G March 2005. The signature of the second respondent on the accounts was held out as proof that the second respondent knew that the Tekala shares had been pledged when he signed the accounts. We could agree with that if not for the fact that as between an aged father and trusted son there must have been a H relationship of confidence between the second respondent and fourth appellant. That the second respondent had entrusted the whole management of KCH and its subsidiary companies to the fourth appellant for years, only testified that while it lasted, the relationship between the second respondent and fourth appellant I must have stood such that confidence was necessarily reposed by the second respondent (see *Tate v. Williamson* (1866) 2 Ch App 55, at pp. 60-61). The mere signature of the second respondent

on the accounts was no evidence that he knew. Learned counsel for the appellants argued that the respondents who were indifferent to the possible violation of their rights should be blamed if limitation had set in. In *Kashi Ram v. Pragi* (1913) 20 IC 538, which was cited to us, the court held that s. 17 of the Indian Limitation Act 1963 did not apply as the defendant had openly entered into occupation of the house claimed by the plaintiff. Perhaps, that argument, that the respondents were indifferent, would hold water if the accounts indeed disclosed that the Tekala shares had been pledged by the fourth respondent. It was contended that the handwritten notes in Chinese of the second respondent against the note in the accounts on the pledge of shares denoted that the second respondent was aware in March 2005 that the Tekala shares had been pledged. But the translation ("Director of Shares Guarantee – see 2929AR) of that notation in Chinese by the second respondent did not reflect that the second respondent knew that it was Tekala shares that had been pledged. Rather, the evidence was that it required an audit by accountants to find that out. The evidence of Chong Key Vui @ Dusun Chong (PW3), an accountant from M/s Ernst & Young, was that the accounts, which were finalised in March 2005 (see 436AR), did not state that Tekala shares had been pledged (see 435AR), that there was insufficient documentation on the shares pledged (see 449AR) and that he only found the information on the pledged shares from details in the records (see 435AR) and from the fourth respondent (see 437AR). It was only after an examination requested by the second and third respondents of the accounting records that PW3 could confirm on 10 May 2006 that the fourth appellant had pledged 1.55 metre Tekala shares (see 1276AR). Since accountants were engaged to investigate, there was no want of diligence on the part of the second and third respondents. At any rate, according to UN Mitra's *Law of Limitation and Prescription,* 12th edn., vol. 2 at p. 1685, under art. 68 of the Indian Limitation Act 1963, which is equipollent with Item 37, "time begins to run when the owner first discovers his property in the possession of the defendant. Want of diligence on the part of the plaintiff is irrelevant". Be that as it may, we do not perceive that the second respondent had taken an undue length of time to ascertain who had pledged what shares. Unravelling the accounts of a company is not a piece of cake. It would be unreasonable to expect the respondents to appreciate there and then the purport of the accounts upon its

release. It would be unreasonable not to give time to the respondents to unravel the accounts. The respondents took 14 months to find out about the pledge of the Tekala shares. Meantime, the fourth appellant was not co-operative. KCH had to resort to a court order (see 2374-2375AR) to compel the fourth appellant to deliver up the statutory, secretarial, accounting books, and other records. Taking all factors into account, 14 months was not unreasonable time for the respondents to unravel the pledge of the Tekala shares by the fourth appellant. We see no reason therefore to disagree with the courts below that time should run from 2006.

[48] His pledge of the Tekala shares was admitted by the fourth appellant. Consequently, the sole issue was whether it was conversion. Leave question seven obliquely proposed that the pledge of the Tekala shares was not conversion, on account that the Tekala shares were yet registered in the name of KCH. It was not denied that those Tekala shares were yet registered in the name of KCH. But 'still registered in the name of KCH' was not even half the story. The full story was that those Tekala shares would not be returned and returned unencumbered to KCH if the share margin trading account were not fully settled by the fourth appellant. The truth of the matter was that KCH had lost its unencumbered title and the possession of its property on account of the singular act of the fourth appellant. Was that not conversion?

[49] In *Fouldes v. Willoughby* (1841) 8 M&W 540, a leading case on the tort of conversion, the owner of two horses embarked on board the ferry of the defendant with his horses. The defendant refused to carry the horses and the owner refused to take them back on shore. The defendant took the horses from the owner and put them on shore and conveyed them to a hotel kept by the defendant's brother. The owner remained on board. The next day, the owner sent for the horses, but they were not delivered up; instead a message was sent to the owner that he might have the horses on sending for them and after paying for their keep, but that if he did not send for them, they would be sold to pay the expenses. The latter was done. The owner sued the defendant for conversion. The judge at the trial told the jury that the ferryman, by taking the horses from the owner and turning them out of the vessel, had been guilty of a conversion. The ferryman appealed. The court of exchequer held that the ferryman was not guilty of conversion, because there was no interference with the plaintiff's

"general right of dominion" over the horses. At pp. 544-545, Lord Abinger C.B. said "what was the intention of the defendant ... a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or anyone else, amounts to a conversion of the chattel." Rolfe B, who later became Lord Chancellor, gave the now well recognised definition of conversion, that it is "a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession". Instead, the ferryman was liable for trespass.

[50] In *Sanderson v. Marsden and Jones* (1922) 10 Lloyd's List Law Reports 467, 472, Atkins LJ distinguished conversion as opposed to trespass as follows:

> An act of conversion differs from mere trespass inasmuch as the former must amount to a deprivation of possession to such an extent as to be inconsistent with the right of the owner and evidence of an intention to deprive him of that right, whereas the latter includes every direct forcible injury or act disturbing the possession of the owner, however slight the act may be.

[51] In *Kuwait Airways Corp v. Iraqi Airways Co* [2002] 2 WLR 1353, 1366, Lord Nicholls established these propositions.

> 39. ... I need not repeat the journey through the textbooks and authorities on which your Lordships were taken. Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the Defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.
>
> 40. The judicially approved description of the tort in Clerk & Lindsell encapsulates, in different language, these basic ingredients. The flaw in IAC's argument lies in its failure to appreciate what is meant in this context by 'depriving' the owner of possession.

> This is not to be understood as meaning that the wrongdoer must himself actually take the goods from the possession of the owner. This will often be the case, but not always. It is not so in a case of successive conversions. For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer.
>
> 41. Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material. The ferryman who turned the plaintiff's horses off the Birkenhead to Liverpool ferry was guilty of conversion if he intended to exercise dominion over them, but not otherwise: see *Fouldes v. Willoughby* (1841) 8 M & W 540.
>
> 42. Similarly, mere unauthorised retention of another's goods is not conversion of them. Mere possession of another's goods without title is not necessarily inconsistent with the rights of the owner. To constitute conversion detention must be adverse to the owner, excluding him from the goods. It must be accompanied by an intention to keep the goods. Whether the existence of this intention can properly be inferred depends on the circumstances of the case. A demand and refusal to deliver up the goods are the usual way of proving an intention to keep goods adverse to the owner, but this is not the only way. (see also *Law Debenture Trust Corporation plc v. Concord Trust and others* [2007] EWHC 1380 (Ch), where the court held that the usual way of showing conversion is by proving a refusal to surrender the property on demand).

[52] Apart from *Kuwait Airways Corp v. Iraqi Airways Co*, a long line of authorities also say that when a defendant manifests an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff, he converts the goods to his own use (see *Fairfax Gerrard Holdings Ltd and others v. Capital Bank plc* [2006] All ER (D) 380); *BMW Financial Services (GB) Ltd v. Bhagwanani* [2007] EWCA Civ 1230; *Club Cruise Entertainment and Travelling Services Europe BV v. Department for Transport* [2008] EWHC 2794 (Comm), *Thunder Air Ltd v. Hilmarsson* [2008] All ER (D) 245; and *White v. Withers LLP and another* [2009] EWCA Civ 1122).

[53] A conversion is a voluntary act by one person inconsistent with the ownership rights of another. "A conversion is the act of wilfully interfering with movable property without lawful justification whereby any person entitled thereto is deprived of the possession of it ... And that the defendant's act may amount to conversion

although he has not acted on his own account or converted to his own use ... In order that this article may apply to suits for relief in respect of property acquired by conversion, it is not necessary that the conversion should have been a dishonest one" (*The A.I.R. Manual,* 4th edn., vol. 24 p. 821). With respect to shares, appropriation of a share certificate has been held as conversion (*African Strategic Investment (Holdings) Ltd and another v. Main* [2011] EWHC 2223 (Ch)). In the instant case, it was more than mere appropriation of the share certificate. It was a dealing of the property of KCH by the fourth appellant that was wholly inconsistent with the ownership rights of KCH. And those shares were not returned despite the demand by the members of KCH at its 2007 EGM to the fourth appellant to return the same. There could not be a clearer case of conversion.

Suits 24 And 26 (Consolidated)

[54] Item 77 which provides that where a suit is of the description "to set aside a decree obtained by fraud, or for any other relief on the ground of fraud" the period of limitation is three years to run "when the fraud becomes known to the plaintiff" is in identical terms with art. 95 of the ILA 1908, the scope of which is the following:

> Scope of Article: This Article is not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. *It applies only to cases where a party has been by means of fraud induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act - Chunder Nath v. Tirthanand*, 3 Cal. 504. **This Article is limited in its application to cases where the relief is claimed on the sole ground of fraud**. It does not apply where fraud is not the basis of the relief but some other matter, although the defendant may have acted fraudulently - *Gour v. Dinonath*, 25 Cal. 49; *Jamsetji v. Hirjibhai*, 37 Bom. 158. In other words, *this Article does not apply where the relief claimed on the ground of fraud is merely ancillary to some main relief, as for instance where the main relief is the declaration of the plaintiff's title to the property*, but there is also a prayer in the plaint for a declaration of a settlement deed as fraudulent and void against the plaintiff - *Bujorji v. Dhunbai*, 16 Bom. I; or where the auction purchaser brings a suit for possession of immoveable property against the mortgagee from the judgment-debtor, after avoidance of the mortgage as being fraudulent, fictitious and void as against the plaintiff - *Uma Shankar v. Kalka*, 6 All. 75.

A …

Again, this article does not apply unless the plaintiff was a party to the decree or to the transaction in which the fraud was committed" (H C Mitra's *Indian Limitation Act 1908* 7th Edn., published in 1924, at page 341).

B …

So long as a person upon whom fraud had been practised remains in ignorance of it, no time will run against him; but when he has acquired knowledge of such fraud, he must, within C three years from the date of obtaining such knowledge, come into Court for relief – *Muhammad Baksh v. Mahomed Ali*, 5 All. 294.

The knowledge predicted by the terms of this Article is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court – *Natha Singh v. Jodha* D *Singh*, 6 All. 406; *Indra v. Rooka*, 3 Ind. Cas. 316.

The defendant setting up the defence of limitation must shew that the plaintiff had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him E to bring the suit. The mere fact that some hints and clues reached the plaintiff which if vigorously and acutely followed up might have led to a complete knowledge of the fraud, is not enough to constitute clear and definite knowledge of it – *Rahimbhoy v. Turner*, 17, Bom. 341 (P.C.), affirming 14 Bom. 408.

F **When it is doubtful as what precise time the fraud became known to the plaintiff, the onus is on the defendant to shew that the suit is out of time** - *Punnayil v. Raman*, 31 Mad. 230" (H C Mitra's *Indian Limitation Act 1908* (*supra*) at page 344) (emphasis added).

G **[55]** In a suit where relief was sought on the basis of fraud, the applicable Item is 77. "In a suit as framed, relief was sought on basis of fraud. Defendant, however, was found guilty of malfeasance, misfeasance and non-feasance. Article of the Indian Limitation Act 1963 applicable to suit was 36 and not 95 of the H ILA 1908. ILR (1967) 2 Punj 804 (812)" (*The A.I.R. Manual* 3rd edn., vol. 13 at p. 755). "When the plaintiff seeks to establish his title in the property ... and even if he frames the suit as one for declaration that the decree of instrument is void, the suit is in substance a suit for cancellation to which this article (95 of the I ILA 1908) will apply" (*The Limitation Act* by M.R. Mallick (*supra*) at p. 651). "Article 59 (of the ILA 1963 which replaced art. 95 of the ILA 1908) envisages a suit to cancel or set aside an

instrument" (*The Limitation Act* by M.R. Mallick (*supra*) at p. 653). Under art. 95 of the ILA 1908, the starting point of limitation is when the fraud become known to the party wrong (see *Ningawwa v. Byrappa* AIR 1968 Supreme Court 956, where it was held that art. 95 of the ILA 1908 prescribes a period of limitation of three years from the time when the fraud becomes known to the party wrong).

[56] Suits 24 and 26 were grounded on the fraudulent disposal of the shares of KCH in the capital of ZZ Wood and ZZ Holdings in 2003. Relief was claimed on the sole ground of fraud. Hence, Suits 24 and 26 were suits of a description that fell squarely under item 77. The period of limitation was three years from "when the fraud becomes known to the party wronged".

[57] The respondents pleaded that that they first learnt of the alleged fraudulent transfer of shares in early 2006. In its defence, the appellants pleaded that "the alleged cause of action is time barred under Item 37 and or Item 38 and or Item 77 and or Item 78" (see p. 149 and 171AR). The appellants pleaded that the respondents "were privy to all statutory documents of the various companies". Crucially, the appellants did not plead that the substance of the resolutions and accounts were ever explained to the second and/or third respondents.

[58] In his submission, learned counsel for the appellants contended that time accrued upon release of the accounts in 2005. The same argument was therefore raised that from the accounts the respondents ought to have learnt that the shares of KCH and ZZ Woods had been transferred. But as said, the period of limitation is three years from "when the fraud becomes known to the party wronged". "In England the cause of action arises when reasonable diligence discovered fraud but under the Limitation Act [1908] limitation does not begin to run before the date of actual knowledge. It is pointed out in *Indra Nath v. Rooke* 37 Cal 81 at p. 85 that what is required for the limitation to start is actual knowledge and not merely suspicion. Moreover knowledge does not include means of knowledge and the fact of knowledge must be distinguished from evidence in proof of fraud" (*Bhimasingh v. Fakirchand* 1948 Nagpur 150, 154). The respondents adduced evidence of actual knowledge in early 2006. The appellants did not adduce any evidence that the respondents knew before early 2006. The appellants relied on the accounts as first knowledge gained in 2005. But as said, "Want of diligence on the part of the

plaintiff is irrelevant" (UN Mitra's *Law of Limitation and Prescription* (*supra*) at p. 1685). In any case, on the facts and circumstances, it would not seem that there was reason for the second respondent to question the accounts upon its release. Indeed, as said, while it lasted, the relationship between the second respondent and fourth appellant must have stood such that confidence was necessarily reposed by the second respondent in his trusted son to whom he had entrusted the entire management of KCH and the subsidiary companies. The relationship was such that it was more probable than not that based on trust alone, the second respondent, who was illiterate in English, would have signed the resolutions and accounts without any understanding or appreciation of it whatsoever. In the conversion claim, we held that the respondents could not have appreciated there and then the purport of the accounts upon its release, and that time must be given to the respondents to unravel the accounts. Given those factors, it could not be reasonably inferred that upon release of the accounts in 2005, the respondents knew that they had lost ZZ Plantation and Granright. In any event, the accounts did not disclose that the respondents had a right to a cause of action against the appellants. Hence, it would be unfair to equate the accounts as disclosure of the right of action.

[59] On first knowledge, the respondents pleaded that "in early 2006, the second and third respondents discovered that the fourth appellant had wrongfully and/or fraudulently caused (KCH) to lose control and ownership of (ZZ Plantation) (see 124AR) and Granright (see 158AR). Consistent with those pleadings, the second respondent affirmed that he only came to know in early 2006 that the plantations were no longer controlled by KCH, when Michael informed him that he had chanced upon his bankers who told him (Michael) so. The appellants did not plead any anterior date of knowledge.

[60] On onus of proof, in *Nanji & Co v. Jatashankaar Dossa* AIR 1961 Supreme Court 1474, where on the right to sue "within three years from the date of his coming to know of a fact" the Indian Supreme Court held that it is the duty of the plaintiff to establish, at any rate *prima facie*, that the suit is within time and is not barred by lapse of time. "The onus is on the plaintiff to prove that he first learnt within three years of the suit ... In other words, he has to prove that he obtained the knowledge ... within three years of the suit, and that is all. If he proves this, then to

succeed on the plea of limitation the defendant has to prove that the fact ... became known to the plaintiff more than three years prior to the suit (see p. 1479 of the report; also see *Gunabai v. Motila* 1925 Nagpur 398, 400). If the defendant fails to do that, the allegation of the plaintiff as to the date of knowledge stands unrebutted (*Nibaran v. Nirupama* AIR 1921 Cal 131). Where there is no proof of the date when it became known, the action is time-barred (see *Kalyan Mal v. Ahmad Uddin* AIR 1934 Privy Council 208). "When it is doubtful at what precise time the fraud became known to the plaintiffs, the onus is on the defendant to show that the suit is out of time (*Rahimbhoy v. Turner*)" (*Moidiyan's son Punnavil Kuttu v. Raman Nair* 1908 Indian Law Reports Madras Series Vol XXXI 230).

[61] The approach of the trial court was not only different but also, with respect, circuitous. The trial court first held that the respondents were entitled to rely on s. 18 of the SLO and then applied Item 77. As said, s. 18 of the SLO postpones or suspends the period of limitation. But Item 77 also suspends or postpones the period of limitation. Under Item 77, the starting point of the period of limitation of three years is "when the fraud becomes known to the plaintiff". Where the applicable Item is 77, s. 18 of the SLO is not needed at all for enlargement of the period of limitation. Since the respondents contended that they first knew in early 2006, it was the duty of the respondents to establish, on a *prima facie* basis, that they obtained that knowledge within three years of Suits 24 and 26. If they could make that out, then Suits 24 and 26 were filed within time. The burden would then shift to the appellants to prove that it became known to the respondents more than three years prior to Suits 24 and 26. That was all that there was to it to settle the issue of limitation under Item 77. Section 18 of the SLO was not in the equation. Unfortunately, that was not realised. In the result, s. 18 of the SLO was with respect, needlessly deliberated at length by the trial court. But on Item 77, the trial court was to the point:

> I find that the Plaintiffs have proved clearly through the testimonies of their witnesses and the various documentary evidence adduced that the Plaintiffs only discovered the fraudulent acts committed by the 4th Defendant in 2006.
>
> I further find that there is no basis for the Defendants to contend that the Plaintiffs had knowledge of the divestment and disposal of the plantation business as early as April 2003 as I find that the 4th Defendant had intentionally concealed the material

A information from the Plaintiffs, namely the fact that the plantation lands would be taken over by the 4th and 5th Defendants completely as well as by a result of the shares of the 1st Defendant company [ZZ Wood] being divested to the 2nd Defendant company [ZZ Holdings] whose ownership had changed hands on 3.6.2003 without the knowledge of the Plaintiffs (see 3247AR).

[62] Great care was also exhibited by the trial court to explain why the testimony of the second and third respondents and Michael was believed (see 3253-3257AR) and why the testimony of the fourth appellant was not (see 3257-3260AR). The trial court had the audio visual advantage of seeing and hearing the witnesses. The finding of a trial court, in particular on the demeanour of witnesses, is not to be easily disturbed.

[63] On first knowledge, the respondents affirmed that they only knew in early 2006, when Michael informed the second respondent that his bankers informed him (Michael) that the plantation had fallen into the hands of fourth and fifth appellants. Learned counsel for the appellants argued that the bankers should have been called to testify, to corroborate the respondents' version, and in that they were not called to testify, an adverse inference should be invoked against the respondents. The trial court refused to invoke an adverse inference. Had the adverse inference under s. 114(g) of the Evidence Act 1950 been invoked, the trial court could presume that the testimony of those bankers, if produced, would be unfavourable to the respondents, the effect of such presumption would be that the respondents had not been truthful as to the date of their first knowledge.

[64] But legal presumptions are not cast in stone. All legal presumptions could be rebutted. And from the totality of the evidence, it would not appear that the second respondent was an untruthful witness. When the second respondent founded KCH, the ultimate owner or majority owner of all subsidiary companies, he equally divided the issue capital between him, wife and children, without distinction as to son or daughter. That showed that the second respondent was fair and had equal affection for all members of his nuclear family. When the second respondent testified, he was 81, at an age when wealth or material things could not have meant much to him. It could not appear that the second respondent would falsely take sides against his own son to whom he had always only been fair, if it were not to pursue the truth. It would not appear that a man who had displayed only

fairness to all members of his nuclear family, would, in his final years, say untruths for material gain that he had little use of. There could be no mistake about it. The second respondent was not in court for self-enrichment. The second respondent was in court to restore equilibrium. That being the character of the man, it would not seem probable that the second respondent would lie about his first knowledge, if it were not the truth. The same could be said of the third respondent, who as a mother to all, would surely not testify against her own son, if it were not the truth. The adverse inference under s. 114(g) of the Evidence Act, if invoked, was rebutted by the evidence. Given the facts and circumstances, the respondents had made out, at least *prima facie*, that first knowledge was gained in 2006.

[65] Under the ILA 1908, it was held "that time ran only when the plaintiff becomes aware of the fraud. A 1963 Assam 4(7) ** A 1972 446 (448, 453) ** A 1963 Assam 4(6) ** A 1939 All 348 (367)(DB) *** (1958) 1 Andh WR 166 (168, 169)" (*The A.I.R Manual,* 4th edn. at p. 702). "Where under the Act, time does not run unless and until the plaintiff has knowledge of certain facts, the onus of proving the knowledge of facts at a date anterior to that admitted by the plaintiff lies on the defendant (1906) 2 Nag LR 98 (99, 100) ** A 1925 Nag 398 (400) ** A 1939 All 348 (368)(DB) ** A 1921 Cal 131 (138)(DB) ** A 1938 Rang 264 (264)(DB)" (*The A.I.R Manual,* 4th edn. at p. 702). Even so, the appellants steadfastly refused to plead an anterior date of first knowledge. The fifth appellant even refused to testify and defend herself in court. The appellants merely threw the accounts at the respondents and contended that first knowledge was gained in 2005. But as said, time must be allowed to the second and third respondents to decipher the accounts. Given the confidence reposed by the second respondent, it would be unreasonable to impose a duty of due diligence on the second respondent to enquire there and then on accounts prepared by a trusted son. Simply put, in the absence of reasons to the contrary, and there were none in 2005, it would not seem that the second respondent should enquire into the accounts in 2005. It was improbable that the respondents could have gained first knowledge in 2005.

[66] So apart from the reasons given by the trial judge, which we wholly endorse, together with all reasons given here and in the conversion claim, we find that the probabilities were such that first knowledge could not have been gained in 2005 that the

A plantations had been lost. Ultimately, it was the evidence of the respondents that they knew in 2006 versus the evidence of the fourth appellant alone that the respondents knew in 2005. The trial court preferred the direct evidence of the respondents. We have closely examined the reasons given by the trial court. But we
B only find that the trial court was wholly warranted to prefer the version of the respondents. We find it entirely unbelievable that the second and third respondents could have knowingly divested KCH of its plantations for a measly consideration of RM180,000 (see 2316 and 3129AR). There was no appealable error to reverse
C the finding below that Suits 24 and 26 were filed within time.

[67] That leaves us only to give our answers to the leave questions, which are as below:

D Question 1 - Whether it is incumbent on a plaintiff seeking the benefit of s. 18 of the Sabah Limitation Ordinance to distinctly allege with particulars the particular fraud (actual or constructive), by which he has been kept from the knowledge of his right of suit against the
E defendant?

Answer - It is not incumbent on a plaintiff seeking the benefit of s. 18 of the SLO to distinctly classify the means (actual or constructive) by
F which he has been kept from the knowledge of his right of suit against the defendant.

Question 2 - Where a plaintiff invokes 'concealed fraud' under s. 18, whether it is incumbent for him
G to plead the acts or particulars of concealment, and of the affirmative action by the defendant by which he was allegedly kept out of knowledge?

H Answer - When a plaintiff invokes s. 18 of the SLO, it is incumbent on him to plead the acts or particulars of concealment and or the affirmative action by which he was allegedly kept out of knowledge, unless the character
I of concealment is acquired from the manner in which the act was performed.

Question 3 - Where concealed fraud is pleaded under s. 18, whether the phrase 'from the time when the fraud first became known to the person' is to be determined on a subjective or objective basis, meaning that a person who chooses to remain indifferent to events around him cannot invoke s. 18?

Answer - Where concealment is pleaded under s. 18 of the SLO, the phrase 'from the time when the fraud first became known to the person' is to be determined on an objective basis (see *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors & Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174, 211, 212, where on honesty or dishonesty, it was held that the subjective mind is to be adjudged on an objective basis).

Question 4 - In an action for the tort of wrongful conversion in Sabah, whether the applicable limitation period is three years under Item 37 or six years under Item 97 of the Sabah Limitation Ordinance?

Answer - In an action for the tort of wrongful conversion in Sabah, the applicable limitation period is three years under Item 37 (see *Asia General Equipment and Supplies Sdn Bhd & Ors v. Mohd Sari Datuk Hj Nuar & Ors* [2011] 8 CLJ 749; [2012] 3 MLJ 49 per James Foong FCJ).

Question 5 - Whether a plaintiff is entitled to succeed on a charge of fraud when the fraud as found by the trial court is not the fraud as pleaded?

Answer - With the supporting facts, a plaintiff is entitled to succeed on a charge of fraud when the fraud as found by the trial court is not the fraud as pleaded.

Question 6 - (Where) a plaintiff relies on the type of fraud called equitable or constructive fraud, whether it is incumbent on him to plead the particulars

of this class of fraud as would be incumbent on him if he were to plead fraudulent misrepresentation or common law fraud?

Answer - When a plaintiff relies on the type of fraud called equitable or constructive fraud, it is incumbent on him to plead facts to support the class of fraud. We must add that "The most important issue concerning the sufficiency of pleadings remains whether the defendant is informed of the case to be met and is not unfairly taken by surprise" (*Oliver v. Decorby*, 2005 SKQB 279, (2005), 267 Sask.R. 147 (Q.B.) per Ball J), and "The general rule that fraud must be specifically pleaded would not ... apply when the party aggrieved raised no objections and fights out the case as though the pleadings were in proper form (*Beni Madho v. Basanto Kunbi* 35 IC 252 All)" (Mogha's *Law of Pleadings in India* 16th edn. at p. 66).

Question 7 - Whether the tort of conversion is committed in relation to shares in a public listed company when the shares remained in the ownership of the true owner and the pledge is disclosed in the audited accounts of the company and duly acknowledged by the directors?

Answer - The tort of conversion is committed even where the legal ownership of the shares in a public listed company remains with the true owner and the pledge of those shares by the wrongdoer is disclosed in the audited accounts of the company.

Question 8 - Whether a plaintiff who relies on the existence of fiduciary duty or any obligation under the Companies Act 1965 must assert and plead it in his statement of claim?

Answer - We decline to answer a question that is academic to these appeals.

[68] These appeals were argued on issues of limitation and pleadings. Since s. 18 of the SLO had no application, our answers to leave questions 1-3 would be inconsequential to the result. Since the suits were filed within time, our answer to leave question 4 would not reverse the result. Our answers to leave questions 5 and 6 would also not change the result. As for leave question 7, that was answered decidedly against the appellants. Given those answers, these appeals must necessarily fail.

[69] Still, we need to correct the orders below. With respect to the conversion claim, the measure of damages was the redemption sum to redeem those shares and not the value of the Tekala shares. With respect to suits 24 and 26, ZZ Wood only owned 80% of the equity of ZZ Holdings, and ZZ Holdings only owned 80% of the equity of ZZ Plantation and 85% of the equity of Granright.

[70] For the above reasons, we unanimously dismiss these appeals with costs. We set aside all orders of the courts below and make in its place the following orders:

(i) that the fourth appellant do pay to KCH the full redemption sum to redeem the Tekala shares; the full redemption sum shall be that stated in the redemption statement to be obtained by the respondents and/or KCH, which redemption statement shall be filed in this court, and the sum stated as the redemption sum in the redemption statement shall be the sum to be paid by the fourth appellant to KCH under this order.

(ii) that the shareholdings of the members of ZZ Wood to be restored to the position as at 3 June 2003, that is, before the impugned transfers of shares, and that the shareholdings of the members of ZZ Holdings to be restored to the position as at 4 June 2003, that is, before the impugned transfer of shares.

(iii) that all transfers and or allotments of shares in the capital of ZZ Wood on or after 3 June 2003 and in the capital of ZZ Holdings on or after 4 June 2003 do stand cancelled and are of no effect.

(iv) that the shareholdings of the members of ZZ Plantation be restored to the proportion of 80% to ZZ Holdings and that the shareholdings of the members of Granright be restored to the proportion of 85% to ZZ Holdings.

A (v) that the register of members of ZZ Wood, ZZ Holdings, ZZ Plantations and Granright be rectified pursuant to s. 162 of the Companies Act 1965 to reflect the above orders.

B (vi) that in relation to the register of members of ZZ Wood, ZZ Holdings, ZZ Plantations and Granright, a notice of rectification be lodged.

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